

# Dollars and Sense: Designing a Reasonable Accommodation under Section 504 of the Rehabilitation Act

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## I. INTRODUCTION

It is something most of us never think about: how do individuals with visual impairments distinguish a one-dollar bill from a five, a ten, or a twenty? In cash transactions, all of the design features that indicate the value of a bill are visual clues. On each of the six denominations in production today, the front displays a portrait unique to the denomination, the value, and the treasury seal.<sup>1</sup> Every denomination in United States currency is the same size, 67 mm by 156 mm, and feels the same to the touch.<sup>2</sup> Without the ability to see the face of the bill, the different denominations are indistinguishable to individuals with visual impairments.<sup>3</sup> Furthermore, of the more than 180

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<sup>1</sup> COMM. ON CURRENCY FEATURES USABLE BY THE VISUALLY IMPAIRED, CURRENCY FEATURES FOR VISUALLY IMPAIRED PEOPLE 9 (1995). The six denominations now in print are \$1, \$5, \$10, \$20, \$50, and \$100. *Id.* Some denominations now also include different, subtle background colors. Bureau of Engraving & Printing, U.S. Dep't of the Treasury, About the Redesigned Currency, <http://www.moneyfactory.gov/newmoney/main.cfm/currency/aboutNotes>.

<sup>2</sup> COMM. ON CURRENCY FEATURES USABLE BY THE VISUALLY IMPAIRED, *supra* note 1, at 9–10.

<sup>3</sup> See *id.* at 24. In this Note, the phrase “individuals with visual impairments” is used in place of the word “blind.” Distinguishing among different denominations of paper currency also can be difficult for individuals with poor vision and for those who are “legally blind.” In Social Security legislation, Congress has defined “legal blindness” as follows: “An individual shall be considered to be blind . . . if he has central visual acuity of 20/200 or less in the better eye with the use of a correcting lens.” Social Security Act, 42 U.S.C. § 1382c(a)(2) (2000). Therefore, a person who is legally blind can see at a distance of 20 feet what a person with normal vision can see at 200 feet. REBECCA B. MARCUS, *BEING BLIND* 60 (1981). For people who are legally blind or who have low vision, the ease of identification depends on many factors, including the level and direction of lighting and the nature of the visual impairment. COMM. ON CURRENCY FEATURES USABLE BY THE VISUALLY IMPAIRED, *supra* note 1, at 24.

countries that issue paper currency, the United States is the only one to print bills without any features that would aid visually impaired individuals in differentiating values of currency.<sup>4</sup>

There are a variety of strategies that individuals with visual impairments employ to handle bills. Generally, bills of different denominations are folded in different ways, or stored in separate parts of a wallet.<sup>5</sup> However, regardless of the storage method chosen, the bills must first be identified either by someone who can see or by a scanning device.<sup>6</sup> Having bills identified by a sighted person often requires trusting the stranger on the other side of a transaction.<sup>7</sup> Electronic devices that scan bills and audibly identify the denomination are generally expensive, cumbersome, and unreliable.<sup>8</sup> Therefore, neither of these alternatives is suitable as a replacement for the ability to identify bills personally.

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<sup>4</sup> Am. Council of the Blind v. Paulson, 463 F. Supp. 2d 51, 54 (D.D.C. 2006). Individuals with visual impairments are able to distinguish coins by touch because pennies, nickels, dimes and quarters are all different sizes. MARCUS, *supra* note 3, at 85. In addition, pennies and nickels have smooth edges whereas dimes and quarters have rough edges. *Id.*

<sup>5</sup> Jen Haberkorn, *Currency Changes Ordered to Help Blind: Treasury Told to Find Solution*, WASH. TIMES, Nov. 29, 2006, at A1. One author gave the following example:

Bills go into the wallet in a certain way, so that a blind person knows what kind they are. A sighted person first helps by telling what each bill is. Then the bills are arranged by a system. For instance, one-dollar bills are left unfolded. Five-dollar bills are folded once, from end to end, and ten-dollar bills are folded in fourths. Each kind of bill is kept in a separate part of the wallet, if possible.

MARCUS, *supra* note 3, at 85.

<sup>6</sup> Tess Nacelewicz, *Of Two Minds on Making Change: Visually Impaired Mainers Don't All Agree that Altering the Shape of U.S. Bills So Value Can Be Determined By Touch is a Good Idea*, PORTLAND PRESS HERALD, Jan. 21, 2007, at B1.

<sup>7</sup> The following account is illustrative:

One evening I paid for a pizza with what I thought was a twenty-dollar bill. Later that night, the pizza delivery man returned to my apartment and said that what I had given him was a hundred-dollar bill, not a twenty. He explained that because the light over my door was burned out, he couldn't see well enough to catch the mistake in time. I was so grateful for his honesty that I ended up tipping him thirty dollars . . . .

Memorandum of Points and Authorities in Opposition to Defendant's Motion to Exclude Evidence at 5, Am. Council of the Blind v. Paulson, 463 F. Supp. 2d 51 (D.D.C. 2006) (No. 1:02CV00864 JR).

<sup>8</sup> Nacelewicz, *supra* note 6. See also Am. Council of the Blind, 463 F. Supp. 2d at 55 (describing readers as "slow, unreliable, and expensive"). Electronic note readers retail for close to \$300. *Id.* at 56.

The most obvious potential substitutes for paper currency, debit cards and credit cards, are inadequate for individuals with visual impairments.<sup>9</sup> When making a purchase on a debit card, the user is often required to enter a pin number on a number pad, and not all of these pads incorporate Braille.<sup>10</sup> For the large percentage of individuals with visual impairments who are unemployed, qualifying for a credit card is unlikely.<sup>11</sup> Thus, individuals with visual impairments are frequently unable to use common cash substitutes, which makes the difficulties created by the current currency design tough to circumvent.

Over the years, numerous laws have been enacted to afford Americans with disabilities better access to services and programs, and to prevent discrimination against those with disabilities. Legislation has been enacted to address access to education,<sup>12</sup> transportation,<sup>13</sup> architectural structures,<sup>14</sup> and employment opportunities.<sup>15</sup> Much of what Congress has sought to remedy through these laws was not the result of intentional discrimination, but rather was the result of "thoughtlessness and indifference."<sup>16</sup> Currency, like transportation and architectural barriers, was not intentionally designed to be discriminatory. But unlike transportation and architectural barriers, better

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<sup>9</sup> Nacelewicz, *supra* note 6.

<sup>10</sup> *See id.*

<sup>11</sup> *Id.* In addition, both credit cards and debit cards require sight to ensure that the amount charged is correct. Robin Farmer, *Blind Want Changes in Currency*, RICHMOND TIMES DISPATCH, Jan. 13, 2007, at B9. Furthermore, debit and credit cards are not services provided by the federal government, and they should not be used as a way for the government to evade its responsibilities under the Rehabilitation Act.

<sup>12</sup> Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1400–1487 (2000). This statute is now known as the Individuals with Disabilities Education Act (IDEA). *See id.*

<sup>13</sup> Urban Mass Transportation Assistance Act of 1970, Pub. L. No. 91-453 § 16, 84 Stat. 962, 967–68 (1970) (requiring local transportation authorities subject to the Act to plan and design mass transit systems that are accessible to individuals with disabilities).

<sup>14</sup> Architectural Barriers Act of 1968, 42 U.S.C. §§ 4151–4157 (2000) (requiring that buildings and facilities designed, constructed, or altered with federal funds or leased by a federal agency, comply with federal standards for physical accessibility).

<sup>15</sup> *E.g.*, Rehabilitation Act of 1973 § 501, 29 U.S.C. § 701 (2000) (requiring affirmative action and nondiscrimination in employment by Federal agencies and the executive branch); Rehabilitation Act of 1973 § 503, 29 U.S.C. § 793 (2000) (requiring affirmative action and prohibiting employment discrimination by federal government contractors and subcontractors with contracts of more than \$10,000); Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (2000) (prohibiting discrimination on the basis of disability in state and local government employment, public accommodations, commercial facilities, transportation, and telecommunications).

<sup>16</sup> *Alexander v. Choate*, 469 U.S. 287, 295 (1985).

access to currency through design adaptation has not been specifically ordered by federal law.

Dissatisfied with the inaction of the U.S. Treasury Department and Congress, the American Council of the Blind (ACB), a leading advocacy group for visually impaired Americans, filed a complaint in federal district court under Section 504 of the Rehabilitation Act.<sup>17</sup> Section 504 mandates nondiscrimination and reasonable accommodation by recipients of federal financial assistance.<sup>18</sup> In *American Council of the Blind v. Paulson*,<sup>19</sup> the ACB alleged that the failure to design and issue paper currency that was readily distinguishable to individuals with visual impairments violated Section 504.<sup>20</sup> The Federal District Court for the District of Columbia held that the current design of paper currency does discriminate against individuals with visual impairments and therefore does violate the Rehabilitation Act.<sup>21</sup> Following this decision, the Government quickly filed an appeal.<sup>22</sup> In contending that currency design is not discriminatory, the Government has the support of the National Federation of the Blind, another leading advocacy group for individuals with visual impairments.<sup>23</sup> Having these two leading advocacy groups on opposite sides of the issue has ensured scrutiny of the district court's decision,<sup>24</sup> but it also makes it unclear whether this decision, if upheld, will be embraced as a positive step for disability rights.

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<sup>17</sup> 29 U.S.C. § 794 (2000).

<sup>18</sup> *Id.* at § 794(a).

<sup>19</sup> 463 F. Supp. 2d 51 (D.D.C. 2006).

<sup>20</sup> *Id.* at 52. The Government's motions for summary judgment and to dismiss were denied two years earlier. *Id.* at 52–53 (citing *Am. Council of the Blind v. Snow*, 311 F. Supp. 2d 86, 86–91 (D.D.C. 2004) (In *Snow*, the court held that there is no conflict between the Secretary of the Treasury's duty to design currency in the best manner to guard against counterfeits and the Secretary's duty under the Rehabilitation Act. In addition, the court found that the plaintiffs had stated a valid claim under the Rehabilitation Act.)).

<sup>21</sup> *Am. Council of the Blind*, 463 F. Supp. 2d at 62.

<sup>22</sup> \$1, \$20? Only USA Makes Bills Hard for Blind to Use, USA TODAY, Dec. 14, 2006, at A17. See also Brief for the Appellant, *Am. Council of the Blind v. Paulson*, 463 F. Supp. 2d 51 (D.D.C. 2006), appeal docketed, No. 07-5063 (D.C. Cir. July 23, 2007).

<sup>23</sup> See *infra* Part III.A.

<sup>24</sup> See, e.g., Edmund L. Andrews, *U.S. Currency Discriminates Against Blind*, Judge Rules, N.Y. TIMES, Nov. 29, 2006, at A24; Roger Parloff, *The Blind Undercutting the Blind*, FORTUNE, Jan. 22, 2007, at 26; *Good Morning America: Bush Admin. Pushes Back; Money for the Blind?* (ABC television broadcast Dec. 14, 2006); *Judge Rules Paper Money Unfair to Blind: Judge Says Treasury Department Is Violating the Law by Keeping All Money the Same Size and Feel*, CNNMONEY.COM, Nov. 29, 2006, [http://money.cnn.com/2006/11/28/markets/treasury\\_ruling/index.htm](http://money.cnn.com/2006/11/28/markets/treasury_ruling/index.htm) (last visited Apr. 20, 2008).

The debate over currency redesign highlights one common policy problem in certain disability discrimination cases: whether a finding of discrimination will be more of a help by providing access to services and programs or more of a hindrance by perpetuating the impression that individuals with disabilities are incapable.<sup>25</sup> In addition, the decision in *American Council of the Blind v. Paulson* raises two other important issues. First, whether the court will approve a remedy that will apply equally to all users of currency regardless of disability, or if it will opt for a remedy that is tailored along the lines of “separate but equal.”<sup>26</sup> Second, whether this decision, if upheld, will set in motion other sweeping changes to services that may be found to be discriminatory under Section 504.

This Note explores the legal and public policy implications of currency redesign under Section 504 of the Rehabilitation Act. First, Part II will provide an overview of the history and creation of the Rehabilitation Act. This Part will include an explanation of the standard for discrimination and the remedies authorized under the Act. Next, Part III will examine the ideological differences between two leading national organizations representing the interests of individuals with visual impairments, the American Council of the Blind and the National Federation of the Blind. Part IV discusses the difficulty of determining whether the design of paper currency is discriminatory when there is a divide among individuals with visual impairments over whether or not they have meaningful access to paper currency. Finally, Parts V and VI explore potential remedies and other thoughtful changes that could result if a currency redesign is mandated.

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<sup>25</sup> The debate over the use of cochlear implants offers another example where some members of the disability community prefer the status quo. Cochlear implants are devices consisting of a microphone, which rests outside the ear, and a receiver implanted under the skin. Adam M. Samaha, *What Good is the Social Model of Disability?*, 74 U. CHI. L. REV. 1251, 1270 (2007). While these devices are designed to allow the user to experience representations of sound and may help the user to develop spoken language ability, members of the Deaf Culture community do not think that individuals with hearing impairments should try to repair deafness. *Id.*

<sup>26</sup> See discussion *infra* Parts IV.C.2, V. The currency itself could be redesigned, which would apply to everyone equally, or the government could subsidize portable currency scanning devices which would provide access but would not constitute equal treatment. *Id.*

## II. HISTORY AND APPLICATION OF THE REHABILITATION ACT

### A. *The Influence of the Civil Rights Movement*

Title VI of the Civil Rights Act of 1964 prohibits racial discrimination in federally funded programs and activities.<sup>27</sup> Since its passage, Title VI has served as an important model for other legislation prohibiting discrimination in federal programs against subordinate groups.<sup>28</sup> For example, it influenced Title IX of the Education Amendments of 1972, a law prohibiting gender-based discrimination;<sup>29</sup> the drafters of Title IX intended that it would be interpreted and applied as Title VI had been.<sup>30</sup>

Legislation designed to protect the rights of individuals with disabilities is often based on Title VI and Title IX.<sup>31</sup> However, the civil rights movement of the 1950s and 1960s and the women's movement of the 1970s were broader based and better disseminated into the popular consciousness than the disability rights movement.<sup>32</sup> During the disability rights movement, there was not widespread popular understanding of the injustices faced by people with disabilities or of the nature of their continuing struggle for inclusion and equality.<sup>33</sup>

In the early 1970s, as much of the anti-discrimination legislation for individuals with disabilities was being enacted,<sup>34</sup> the public did not generally

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<sup>27</sup> The relevant portion of the Act reads: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (2000).

<sup>28</sup> RICHARD K. SCOTCH, *FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY* 27 (2d ed. 2001).

<sup>29</sup> *Id.* The Education Amendments of 1972 are codified at 20 U.S.C. §§ 1681-1688 (2000). Title IX substitutes the word "sex" to replace the words "race, color, or national origin" in Title VI. *See* 20 U.S.C. § 1681(a) (2000). This statute has been applied to curriculum, admissions, and career counseling, among other programs, but the best known application has been the distribution of resources between men's and women's athletic programs. SCOTCH, *supra* note 28, at 27.

<sup>30</sup> *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696 (1979).

<sup>31</sup> *See* SCOTCH, *supra* note 28, at 52. *See also* Marc Charnatz and Sarah Geer, *Program Specificity and Section 504: Making the Best of a Bad Situation*, 20 LOY. L.A. L. REV. 1431, 1432 (1987) (explaining that Section 504 is modeled after two statutes containing virtually identical language: Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972).

<sup>32</sup> Linda Hamilton Krieger, *Sociolegal Backlash*, in *BACKLASH AGAINST THE ADA* 353 (Linda Hamilton Krieger ed., 2003).

<sup>33</sup> *Id.*

<sup>34</sup> *See supra* notes 12-15 providing examples of legislation passed in the late 1960s and early 1970s.

associate the word *discrimination* with the exclusion of people with disabilities. The barriers to access that individuals with disabilities encountered were considered an inevitable consequence of the physical and mental differences imposed by the disability.<sup>35</sup> Furthermore, when Congress was discussing legislation to benefit individuals with disabilities, the perception was that the discrimination they faced was “not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect.”<sup>36</sup> Through this early legislation, Congress was seeking to remedy “shameful oversights”<sup>37</sup> and to respond to “previous societal neglect.”<sup>38</sup> Proposals were based on the idea that it was time to raise awareness about the needs of people with disabilities.<sup>39</sup> These attitudes reflected a desire to provide individuals with disabilities social services, but not to effect sweeping social reform.<sup>40</sup>

The original proposal for disability rights legislation presented in Congress was to amend the Civil Rights Act by adding “‘physical or mental handicap’ to race, color, and national origin as illegal grounds for discrimination.”<sup>41</sup> However, due to concerns that any significant broadening of the scope of the Civil Rights Act would diminish enforcement of the existing provisions, amending the Act to include individuals with disabilities was rejected.<sup>42</sup> Instead, Congress enacted the Rehabilitation Act of 1973<sup>43</sup> as

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<sup>35</sup> THOMAS F. BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS* 70 (2002).

<sup>36</sup> *Alexander v. Choate*, 469 U.S. 287, 295 (1985) (discussing whether discrimination must be intentional in order to be covered under Section 504 of the Rehabilitation Act). In *Alexander*, the Supreme Court considered the legislative history of Section 504 and examined its holding in *Guardians Ass’n v. Civil Service Commission of New York City*, 463 U.S. 582 (1983), to determine whether Section 504 reaches both intentional and disparate-impact discrimination. 469 U.S. at 293–94. The *Alexander* Court found that *Guardians* did not support a “blanket proposition that federal law proscribes only intentional discrimination against [individuals with disabilities].” *Id.* at 294.

<sup>37</sup> 117 CONG. REC. 45,974 (1971) (statement of Rep. Vanik).

<sup>38</sup> 119 CONG. REC. 5883 (1973) (statement of Sen. Cranston).

<sup>39</sup> For example, Senator Hubert H. Humphrey stated “we can no longer tolerate the invisibility of [individuals with disabilities] in America.” 118 CONG. REC. 525 (1972).

<sup>40</sup> ANITA SILVERS, DAVID WASSERMAN & MARY B. MAHOWALD, *DISABILITY, DIFFERENCE, DISCRIMINATION* 119 (1998).

<sup>41</sup> SCOTCH, *supra* note 28, at 43. The nondiscrimination principle initially proposed as an amendment to Title VI and later codified in Section 504 was introduced by Representative Charles Vanik in the House and a companion measure was introduced by Senators Humphrey and Charles Percy in the Senate. *Alexander v. Choate*, 469 U.S. 287, 295 n.13 (1985).

<sup>42</sup> SCOTCH, *supra* note 28, at 45.

<sup>43</sup> 29 U.S.C. §§ 701–796 (2000).

a way to proscribe discrimination against individuals with disabilities in programs receiving federal financial assistance.<sup>44</sup>

The Rehabilitation Act has three major provisions addressing federal involvement in programs: Sections 501, 503, and 504.<sup>45</sup> Sections 501 and 503 prohibit federal agencies and federal contractors from refusing to employ an otherwise qualified individual solely on the basis of a disability.<sup>46</sup> Section 504 is a more far-reaching and significant section.<sup>47</sup> That Section applies broadly to recipients of federal financial assistance, including education programs, public facilities, transportation, and health and welfare services.<sup>48</sup> Section 504 mandates nondiscrimination and reasonable accommodation<sup>49</sup> and gives individuals with disabilities the power to sue as a means to challenge and eliminate discriminatory practices.<sup>50</sup> It is a significant federal protection for individuals with disabilities.<sup>51</sup>

At the time Section 504 was added to the Rehabilitation Act, neither members of Congress nor those concerned with disability issues focused on this section, but within a few years it was considered landmark legislation.<sup>52</sup> Because the merits of this provision were not debated, there is scant legislative history to suggest what members of Congress had in mind when Section 504 was enacted.<sup>53</sup> According to one of the Act's sponsoring

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<sup>44</sup> SCOTCH, *supra* note 28, at 52. See also Martha T. McCluskey, *Rethinking Equality and Difference: Disability Discrimination in Public Transportation*, 97 YALE L.J. 863, 864 (1988).

<sup>45</sup> LAURA ROTHSTEIN & JULIA ROTHSTEIN, *DISABILITIES AND THE LAW* 5 (3d ed. 2006). See *supra* note 15 for a brief description of Sections 501 and 503.

<sup>46</sup> See *supra* note 15.

<sup>47</sup> ROTHSTEIN & ROTHSTEIN, *supra* note 45, at 5.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> BURKE, *supra* note 35, at 61 (discussing the enactment of the Americans with Disabilities Act, which is designed to serve a purpose similar to Section 504 of the Rehabilitation Act).

<sup>51</sup> It was the most significant federal protection for individuals with disabilities until the enactment of the Americans with Disabilities Act (ADA) in 1990. ROTHSTEIN & ROTHSTEIN, *supra* note 45, at 5.

<sup>52</sup> SCOTCH, *supra* note 28, at 52. Section 504 of the Rehabilitation Act was not enacted in response to a broad social movement for disability rights, or through the efforts of particular disability rights lobbyists or activists; it was included in the Rehabilitation Act based on the impulse of a group of congressional staffers who were familiar with Title IX, but who were relatively inexperienced and unfamiliar with disability issues. Krieger, *supra* note 32, at 353-54.

<sup>53</sup> SCOTCH, *supra* note 28, at 52 (noting that House and Senate committee reports and conference reports contain only passing references to Section 504, no public expenditures were projected for Section 504, and no mention of it was made during its consideration on the House and Senate floors).



congressmen, “section 504 . . . guarantees, without qualification, equal rights for [individuals with disabilities] in federally funded or assisted programs. Its similarity to Title VI of the 1964 Civil Rights Act, in this respect, gives reason to describe section 504 as a Civil Rights Act for [individuals with disabilities].”<sup>54</sup> But, unlike the civil rights legislation upon which it was based, Section 504 rejects the assumption that equal rights translates into equal access.<sup>55</sup> Frequently, an individual’s disability will affect participation in federally funded programs or services.<sup>56</sup> Therefore, considering an individual’s disability and providing disparate treatment is not automatically discriminatory.<sup>57</sup> The same cannot be said for gender and race. Gender rarely tells anything about a person’s ability, and race never does, so they are impermissible factors when determining whether an individual may participate in government programs or services.<sup>58</sup> Therefore, the goals of Section 504 are subtly different from those of the civil rights legislation upon which it is based.

### B. *An Overview of Section 504 of the Rehabilitation Act*

Section 504 of the Rehabilitation Act provides, in pertinent part, as follows:

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.<sup>59</sup>

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<sup>54</sup> Timothy M. Cook, *The Scope of the Right to Meaningful Access and the Defense of Undue Burdens Under Disability Civil Rights Laws*, 20 LOY. L.A. L. REV. 1471, 1480 (1987) (emphasis added by Cook omitted) (quoting Congressman Vanik). Because there was no debate on Section 504 in either the House or the Senate when the Rehabilitation Act was passed in 1973, the Supreme Court determined that the views of Congressman Vanik and Senators Humphrey and Percy, the sponsors of the predecessor to Section 504, are to be given particular weight in interpreting the legislative history of Section 504. *Alexander v. Choate*, 469 U.S. 287, 295 n.13, 296 n.15 (1985). See also *supra* note 41.

<sup>55</sup> SCOTCH, *supra* note 28, at 152.

<sup>56</sup> 1 BONNIE P. TUCKER & BRUCE A. GOLDSTEIN, *LEGAL RIGHTS OF PERSONS WITH DISABILITIES: AN ANALYSIS OF FEDERAL LAW* § 5:39 (1992).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> 29 U.S.C. § 794 (2000). The remainder of the Act reads:

The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation,

Thus, to prove a violation of § 504, the plaintiff must establish that he or she seeks participation in or benefits of a program or activity receiving federal financial assistance,<sup>60</sup> and that he or she has a disability within the meaning of the Act.<sup>61</sup> In addition, the plaintiff must be “otherwise qualified” for the program or activity at issue,<sup>62</sup> which means that the plaintiff must be able to meet all of the requirements for the program despite having a disability.<sup>63</sup> Finally, the defendant must have discriminated against the plaintiff “solely by reason of her or his disability.”<sup>64</sup>

When applying Section 504 of the Rehabilitation Act, the U.S. Supreme Court has identified two countervailing concerns that are to be weighed by

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Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

As originally enacted, Section 504 only applied to “discrimination under any program or activity receiving Federal financial assistance.” 29 U.S.C. § 794 (1976). The Department of Health, Education and Welfare (HEW), an Executive branch agency, took responsibility for defining what Section 504 meant and how it was to be implemented. SCOTCH, *supra* note 28, at 59. In 1978, the Act was amended to expand the provision prohibiting discrimination to “any Executive agency or . . . the United States Postal Service” and to require the heads of such agencies to promulgate regulations prohibiting discrimination. Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602 § 119, 92 Stat. 2955 (1978). *See also* statement of Representative Jim Jeffords:

Somehow it did not seem right to me that the Federal Government should require States and localities to eliminate discrimination against the handicapped wherever it exists and remain exempt themselves. So I developed a provision which is in this conference report that extends coverage of section 504 to include any function or activity in every department or agency of the Federal Government.

124 CONG. REC. 38,551 (1978). For purposes of *American Council of the Blind v. Paulson*, the Treasury Department is specifically prohibited from “[p]rovid[ing] a qualified individual with [disabilities] with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others.” 31 C.F.R. § 17.130(b)(1)(iii) (2007).

<sup>60</sup> TUCKER & GOLDSTEIN, *supra* note 56, at § 3:15.

<sup>61</sup> The term “individual with a disability” as applied to Section 504 is defined as an individual who: “(i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities; (ii) has a record of such an impairment; or (iii) is regarded as having such an impairment.” 29 U.S.C. § 705(20)(B) (2000).

<sup>62</sup> The phrase “program or activity” is defined to include “all of the operations of . . . a department, agency, special purpose district, or other instrumentality of a State or of a local government.” 29 U.S.C. § 794(b) (2000).

<sup>63</sup> *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 406 (1979).

<sup>64</sup> TUCKER & GOLDSTEIN, *supra* note 56.

the courts: (1) the need to give effect to the statute's objectives of assisting individuals with disabilities; and (2) the need to keep Section 504 within reasonable bounds in accomplishing this purpose.<sup>65</sup> Balancing these two considerations "requires that an otherwise qualified [individual with a disability] must be provided with meaningful access to the benefit that the grantee offers."<sup>66</sup>

### C. *The Meaningful Access Requirement*

Disability rights laws must allow for many kinds of discrimination because a disability may require customized treatment or impose some insurmountable barriers to access.<sup>67</sup> But when an otherwise qualified individual with a disability is denied meaningful access to federally funded programs and services, impermissible discrimination occurs.<sup>68</sup> There is little guidance on how to define the meaningful access standard; it is difficult to determine how exclusionary something has to be to constitute a deprivation of meaningful access.

In creating this standard, the Supreme Court considered the purposes of the Rehabilitation Act and its own prior attempt to define the scope of Section 504.<sup>69</sup> While noting that integrating individuals with disabilities into society was one of the main goals of the Rehabilitation Act, the Court also recognized that this objective had to be tempered by the "legitimate interests of federal grantees in preserving the integrity of their programs."<sup>70</sup> The Court observed that nowhere in the Rehabilitation Act did Congress indicate that every program receiving federal funds had to evaluate how all proposed actions would impact individuals with disabilities and then act based on these evaluations.<sup>71</sup> Therefore, the meaningful access standard exists to balance the

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<sup>65</sup> *Alexander v. Choate*, 469 U.S. 287, 299 (1985).

<sup>66</sup> *Id.* at 301 (citing *Davis*, 442 U.S. 397).

<sup>67</sup> BURKE, *supra* note 35, at 90.

<sup>68</sup> *Alexander*, 469 U.S. at 391. In arriving at the meaningful access standard, the Court relied on *Lau v. Nichols*, 414 U.S. 563 (1974), a leading decision construing Title VI. The *Lau* Court found that providing education solely in English to non-English-speaking students violated Title VI. *Lau*, 414 U.S. at 566. The Court held that "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education." *Id.* Based in part on the *Lau* decision, the *Alexander* Court developed the "meaningful access" standard. *Alexander*, 469 U.S. at 301.

<sup>69</sup> *Alexander*, 469 U.S. at 295-301.

<sup>70</sup> *Id.* at 300.

<sup>71</sup> *Id.* at 298-99 ("Had Congress intended § 504 to be a National Environmental Policy Act for the handicapped, requiring the preparation of "Handicapped Impact

purposes and limitations of the Rehabilitation Act.<sup>72</sup> And in programs where it is determined that individuals with disabilities have meaningful access, there is no violation of Section 504.<sup>73</sup>

It is not necessary for an individual with a disability to prove "no access" in order to show that meaningful access is lacking.<sup>74</sup> Additionally, access alone has been held insufficient to establish meaningful access.<sup>75</sup> And the benefit sought cannot be deliberately defined in a way that would deny an otherwise qualified individual meaningful access.<sup>76</sup> Therefore, in order to provide individuals with disabilities meaningful access, "adjustments to regular programs or the provision of different programs may sometimes be necessary."<sup>77</sup> However, even when accommodation is required, "equal results from the provision of the benefit...are not guaranteed."<sup>78</sup> Furthermore, it is permissible to choose the least expensive means of providing meaningful access to federal or federally assisted activities, but a means that does so must be chosen.<sup>79</sup>

In sum, meaningful access calls for reasonable modifications to accommodate persons with disabilities, but it does not guarantee that individuals with disabilities will receive perfect access.<sup>80</sup> An accommodation that requires the nature of the program to be altered or that is too expensive generally will not be reasonable.<sup>81</sup> Furthermore, meaningful access under Section 504 does not necessarily entitle individuals with disabilities to

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Statements" before any action was taken by a grantee that affected the handicapped, we would expect some indication of that purpose in the statute or its legislative history." (footnote omitted)).

<sup>72</sup> *Id.* at 299-301.

<sup>73</sup> *See id.* at 306.

<sup>74</sup> *Am. Council of the Blind v. Paulson*, 463 F. Supp. 2d 51, 59 (D.D.C. 2006).

<sup>75</sup> *Marisol A. v. Giuliani*, 929 F. Supp. 662, 685 (S.D.N.Y. 1996) (citing *Alexander*, 469 U.S. at 301).

<sup>76</sup> *Alexander v. Choate*, 469 U.S. 287, 301 (1985).

<sup>77</sup> 45 C.F.R. pt. 84, App. A, at 358 (1997); *United States v. Bd. of Trs. for Univ. of Alabama*, 908 F.2d 740,748 (11th Cir. 1990).

<sup>78</sup> *Jones v. City of Monroe*, 341 F.3d 474, 479 (6th Cir. 2003) (citing *Alexander*, 469 U.S. at 305).

<sup>79</sup> *Cook*, *supra* note 54, at 1509 (citing *Choate*, 469 U.S. at 287; *Lau v. Nichols*, 414 U.S. 563 (1974); and *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983)).

<sup>80</sup> *Alexander*, 469 U.S. at 300. The term "reasonable accommodation" does not appear in Section 504, but it is referred to in Section 401 of the Rehabilitation Act, dealing with discrimination on the basis of disability in federal employment. 29 U.S.C. § 791 (2000). The Section 504 regulations provide for reasonable accommodations in employment. *See* 45 C.F.R. § 84.21 (1986). There is no doubt that Section 504 requires federal recipients to make reasonable accommodations in their programs and activities. *See Alexander*, 469 U.S. at 301; *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 411 (1979).

<sup>81</sup> *Davis*, 442 U.S. at 410, 412.

accommodations or remedies that are specially tailored for their circumstances.<sup>82</sup>

#### D. *The Undue Burden Requirement*

Burdens also play a role in limiting the duty to provide individuals with disabilities meaningful access to federal and federally assisted activities. Even where plaintiffs do not have meaningful access, the Rehabilitation Act only provides for accommodations that are “reasonable.”<sup>83</sup> Accommodations are not reasonable if they would entail either “undue financial and administrative burdens”<sup>84</sup> or a “fundamental alteration in the nature of a program.”<sup>85</sup> The test has been interpreted by one commentator as a “cost-greatly-in-excess-of-benefits” balancing.<sup>86</sup>

The Office of Civil Rights of the Department of Health, Education, and Welfare (HEW) was responsible for writing the Section 504 regulations.<sup>87</sup> This Office did not have experience in disability issues but did have a background “enforcing civil rights actions against recalcitrant government officials.”<sup>88</sup> This familiarity led the Office to downgrade cost considerations in designing the regulations because they “believed that the costs of compliance with the regulation were likely to be exaggerated by opponents, just as southerners had exaggerated the costs of complying with desegregation orders.”<sup>89</sup> The Office believed that civil rights should not be balanced against cost and required reasonable accommodation.<sup>90</sup>

#### E. *Remedies Authorized Under Section 504*

The remedies available under Section 504 are those set forth in Title VI of the 1964 Civil Rights Act.<sup>91</sup> Title VI authorizes the withdrawal of federal

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<sup>82</sup> *Alexander*, 469 U.S. at 303.

<sup>83</sup> *Id.* at 301.

<sup>84</sup> *Davis*, 442 U.S. at 412.

<sup>85</sup> *Id.* at 410.

<sup>86</sup> See Judith Welch Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 CORNELL L. REV. 401, 502–05 (1984).

<sup>87</sup> BURKE, *supra* note 35, at 68.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* See also *supra* note 80.

<sup>91</sup> 29 U.S.C. § 794a(a)(2) (2000). The Act states in pertinent part: “The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.” *Id.*

financial assistance from the offending recipient or enforcement of the Act by other legal means.<sup>92</sup> In addition to these statutory remedies, the U.S. Supreme Court has recognized a “presumption in favor of any appropriate relief for violation of a federal right.”<sup>93</sup> “Appropriate relief” against a recipient of federal funds is limited to the forms of relief traditionally available in breach of contract cases: injunction and compensatory damages.<sup>94</sup> This is because in statutes invoking Congress’s power under the Spending Clause,<sup>95</sup> Congress is able to place conditions on the grant of federal funds.<sup>96</sup> This type of legislation is “much in the nature of a *contract*: in return for federal funds, the [recipients] agree to comply with federally imposed conditions.”<sup>97</sup> Therefore, a federal funding recipient is typically on notice that it is subject to traditional breach of contract remedies in addition to the remedies provided for in the relevant legislation.<sup>98</sup> Punitive damages do not fall within “appropriate relief” because they are generally not available for breach of contract.<sup>99</sup>

### III. DIFFERING VIEWS AMONG INDIVIDUALS WITH VISUAL IMPAIRMENTS

The most forceful and committed advocates for disability rights are frequently individuals with disabilities themselves, who often have to claim participation on the basis of rights rather than waiting for “the good will and charity of philanthropists, the government, or the general public.”<sup>100</sup>

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<sup>92</sup> 42 U.S.C. § 2000d-1 (2000). This Section provides in pertinent part:

Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law.

<sup>93</sup> *Barnes v. Gorman*, 536 U.S. 181, 185 (2002) (quoting *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 73 (1992) (emphasis omitted)).

<sup>94</sup> *Id.* at 187.

<sup>95</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>96</sup> *Barnes*, 536 U.S. at 185–86.

<sup>97</sup> *Id.* at 186 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

<sup>98</sup> *Id.* at 187.

<sup>99</sup> *Id.* at 187–88.

<sup>100</sup> SCOTCH, *supra* note 28, at 31.

Individuals with disabilities commonly organize advocacy groups to establish their rights.<sup>101</sup> However, “rights” are not easy to establish— “[b]ureaucratic decision-makers are unlikely to voluntarily acknowledge as rights what can become major claims on institutional resources.”<sup>102</sup> Congressmen have, on multiple occasions, proposed legislation that would require currency to be designed in a way so that it was distinguishable by individuals with visual impairments.<sup>103</sup> However, Congress has not enacted any legislation on this topic, and no significant changes have been made to currency design to make bills discernible by touch.

In an effort to effect change in currency design, the American Council of the Blind sued the U.S. Department of the Treasury. However, not all advocates for individuals with visual impairments support this litigation. The next section summarizes the differing viewpoints of two of the largest advocacy groups for individuals with visual impairments about whether currency in its present form is discriminatory.

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 42. Some argue that it is actually detrimental to lobby for certain categories of rights:

While agencies for the blind and blind persons themselves continue to campaign vigorously for the recognition of the abilities of the blind, another of their activities tends to cloud the issue. Certain highly protective legislation, legislation which gives the impression of assuming that blind persons are helpless, is regularly suggested by agencies and supported by blind people. Whatever the merits of such legislation or the real problems it is intended to solve, its existence to many does confirm the idea that blind people need special assistance and protection or otherwise they would not be able to function at all.

MICHAEL E. MONBECK, *THE MEANING OF BLINDNESS* 9 (1973) (citation omitted).

<sup>103</sup> See, e.g., H.R. 6027, 96th Cong. (1979); H.R. 3656, 97th Cong. (1981); H.R. 2666, 98th Cong. (1983); H.R. 2160, 102d Cong. (1991); H.R. Res. 122, 105th Cong. (1997); see also DEP'T OF THE TREASURY, BUREAU OF ENGRAVING AND PRINTING, *STUDY OF MECHANISMS FOR THE DENOMINATION OF CURRENCY BY THE BLIND OR VISUALLY IMPAIRED* (1983). Most recently, Representative Stark introduced the Catherine Skivers Currency for All Act in the House. H.R. 1931, 110th Cong. (2007). The bill proposes trimming currency before it is put into circulation so that different denominations will be recognizable by individuals with visual impairments. The specific modification of each denomination is as follows: trim all four corners of every one dollar bill; trim three corners of each two dollar bill; trim the upper left-hand and lower right-hand corners of each five dollar bill; trim the upper left-hand and upper-right hand corners of each ten dollar bill, trim the upper left-hand and lower-left hand corner of each twenty dollar bill; and trim one corner of each fifty dollar bill. *Id.* at § 2(a).

### A. *The Ideology of the National Federation of the Blind*

The National Federation of the Blind (NFB) is the largest organization of individuals with visual impairments in America.<sup>104</sup> The organization views visual impairment not as a disability, but as a physical characteristic just like any other that differentiates people.<sup>105</sup> Members generally believe that individuals who are visually impaired should take responsibility for their lives and not regularly rely on the government for assistance.<sup>106</sup> The NFB seeks to avoid the perception that individuals with visual impairments are perpetually in need of help to function in society<sup>107</sup> and to dispel a general tendency of people to overemphasize the kinds and degrees of loss that individuals with visual impairments experience.<sup>108</sup>

The NFB does not believe that individuals with visual impairments lack meaningful access to currency.<sup>109</sup> In fact, the NFB openly supports the U.S. Department of the Treasury in its appeal of the district court decision in

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<sup>104</sup> Press Release, National Federation of the Blind, National Federation of the Blind Comments on Federal Court Ruling on U.S. Currency (Nov. 29, 2006), <http://www.nfb.org/nfb/NewsBot.asp?MODE=VIEW&ID=102&SnID=85905705>.

<sup>105</sup> Cristian Lupsa, *Should US Bills Be 'Blind Friendly'?*, CHRISTIAN SCI. MONITOR, Dec. 7, 2006, at 17.

<sup>106</sup> *Id.* The organization's mission statement reads:

The mission of the National Federation of the Blind is to achieve widespread emotional acceptance and intellectual understanding that the real problem of blindness is not the loss of eyesight but the misconceptions and lack of information which exist. We do this by bringing blind people together to share successes, to support each other in times of failure, and to create imaginative solutions.

National Federation of the Blind Mission Statement, [http://www.nfb.org/nfb/Mission\\_Statement.asp?SnID=123718763](http://www.nfb.org/nfb/Mission_Statement.asp?SnID=123718763) (last visited Apr. 20, 2008). Essentially, the group's philosophy can be summed up by the following quotation: "Blindness doesn't have to be a handicap. It's only an inconvenience. There are almost always other ways to do things. You just have to figure them out." MARCUS, *supra* note 3, at 13.

<sup>107</sup> The organization finds public perceptions about individuals with visual impairments to be problematic: "The real problem of blindness is not the loss of eyesight. The real problem is the misunderstanding and lack of information that exist. If a blind person has proper training and opportunity, blindness can be reduced to a physical nuisance." National Federation of the Blind, <http://www.nfb.org> (last visited Apr. 20, 2008).

<sup>108</sup> See MONBECK, *supra* note 102, at 16. "Studies show that only AIDS and cancer are feared more than blindness." Brief of Amicus Curiae National Federation of the Blind in Support of Appellant at 2, Am. Council of the Blind v. Paulson, 463 F. Supp. 2d 51 (D.D.C. 2006), *appeal docketed*, No. 07-5063 (D.C. Cir. Aug. 3, 2007).

<sup>109</sup> Marc Maurer, Op-Ed, *Inconvenience Is Not Discrimination*, SEATTLE POST-INTELLIGENCER, Dec. 20, 2006, at B7.



*American Council of the Blind v. Paulson*.<sup>110</sup> As the organization's president stated:

Discrimination occurs when the blind are barred from enjoying benefits, goods or services . . . . Sometimes people with disabilities are barred from certain facilities or services because of the way they are designed . . . . But although blind people cannot identify paper currency by touch, that does not prevent us from spending money . . . . We transact business . . . every day . . . . Identifying money by feel, as the blind are often able to do in many other countries, may be more convenient, but inconvenience is not the same thing as discrimination.<sup>111</sup>

The NFB dismisses concerns that the increased likelihood of being cheated by dishonest persons prevents meaningful access.<sup>112</sup> Their position is that the responsibility falls on individuals with visual impairments to handle a question that may arise about being shortchanged during a transaction.<sup>113</sup> The organization cautions that the word "discrimination" should be used responsibly, and that individuals with visual impairments will "achieve nothing by falsely portraying [themselves] as victims and engaging in frivolous litigation."<sup>114</sup>

Furthermore, the NFB contends that a court decision ordering that paper currency be redesigned implies that individuals with visual impairments are not capable of looking out for their own best interests and that "the whole world must be modified for [their] protection."<sup>115</sup> The NFB believes that if *American Council of the Blind v. Paulson* is allowed to stand unchallenged, this ruling will do real harm to individuals with visual impairments by making their goal of "full and equal participation in society virtually impossible to achieve."<sup>116</sup> Moreover, with a seventy percent unemployment

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<sup>110</sup> See Brief of Amicus Curiae National Federation of the Blind in Support of Appellant, *supra* note 108.

<sup>111</sup> Maurer, *supra* note 109.

<sup>112</sup> Brief of Amicus Curiae National Federation of the Blind in Support of Appellant, *supra* note 108, at 9–10.

<sup>113</sup> Maurer, *supra* note 109. For example, NFB maintains that if an individual with a visual impairment believes that he or she is likely to be defrauded, the individual should pay with smaller bills to lessen the amount by which he or she can be defrauded, ask a bystander to confirm a bill's denomination, or loudly announce the anticipated amount of change. Brief of Amicus Curiae National Federation of the Blind in Support of Appellant, *supra* note 108, at 10.

<sup>114</sup> Maurer, *supra* note 109.

<sup>115</sup> Press Release, National Federation of the Blind, National Federation of the Blind Applauds Treasury Appeal (Dec. 12, 2006), <http://www.nfb.org/nfb/NewsBot.asp?MODE=VIEW&ID=111&SnID=695924276>.

<sup>116</sup> *Id.*

rate among Americans with visual impairments, the NFB is concerned that this ruling will give the impression that individuals with visual impairments are unable to handle documents, and thereby create further incentive not to hire employees who are visually impaired.<sup>117</sup>

Despite the NFB's focus on self-reliance, the group does act to fight discrimination. An example of litigation that the NFB supports is *National Federation of the Blind v. Target*.<sup>118</sup> The allegation in that lawsuit was that when the inaccessibility of a company's website impedes the full and equal enjoyment of goods and services offered in stores, it is discriminatory.<sup>119</sup> The NFB filed suit against Target because the store website lacked features that would allow an individual with a visual impairment to navigate the site.<sup>120</sup> Target's website does not allow customers with visual impairments to browse among and purchase products online or to find out important corporate information such as employment opportunities, investor news, and company policies.<sup>121</sup> The NFB believes that the service being denied in this

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<sup>117</sup> *Id.* Marc Maurer, President of the National Federation of the Blind, stated:

Blind people transact business with paper money every day. This ruling puts a roadblock in the way of solving the real problem, which is the seventy percent unemployment rate among working-age blind Americans that severely limits our access to cash. The ruling will do nothing to alleviate that situation; in fact, it seriously endangers the ability of the blind to get jobs and participate fully in society. It argues that the blind cannot handle currency or documents in the workplace and that virtually everything must be modified for the use of the blind. An employer who believes that every piece of printed material in the workplace must be specially designed so that the blind can read it will have a strong incentive not to hire a blind person.

*Id.* Given that the unemployment rate for individuals with visual impairments is already so high, it is unlikely that altering currency so that it is more accessible will cause the unemployment number to rise even higher.

<sup>118</sup> 452 F. Supp. 2d 946 (N.D. Cal. 2006).

<sup>119</sup> *Id.* at 949. Plaintiffs in this case claimed a violation under the Americans with Disabilities Act (ADA), which provides: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a) (2000). The ADA defines a "place of public accommodation" as a "facility, operated by a private entity, whose operations affect commerce and fall within" at least one of twelve categories. 28 C.F.R. § 36.104 (2007).

<sup>120</sup> *Nat'l Fed'n of the Blind*, 452 F. Supp. 2d at 949–50. A feature known as "alternative text," invisible code embedded beneath graphics, would allow individuals with visual impairments to navigate the website with the aid of screen reader software, which vocalizes the alternative text and describes the content of the webpage. *Id.*

<sup>121</sup> Press Release, National Federation of the Blind, Legal Precedent Set for Web Accessibility (Sept. 7, 2006), [http://www.nfb.org/nfb/Target\\_Sept\\_Release.asp?SnID=434667](http://www.nfb.org/nfb/Target_Sept_Release.asp?SnID=434667).

circumstance is more essential than the ability to differentiate denominations of currency because accessibility to internet websites is vital to obtaining and maintaining employment in today's economy.<sup>122</sup>

### B. *The Ideology of the American Council of the Blind*

The American Council of the Blind (ACB) formed as a splinter group of the NFB in 1961.<sup>123</sup> The stated purpose of the ACB is to improve the well-being of all individuals with visual impairments.<sup>124</sup> The ACB proposes to achieve this aim by:

serving as a representative national organization of blind people; elevating the social, economic and cultural levels of blind people; improving educational and rehabilitation facilities and opportunities; cooperating with the public and private institutions and organizations concerned with blind services; encouraging and assisting all blind persons to develop their abilities and conducting a public education program to promote greater understanding of blindness and the capabilities of blind people.<sup>125</sup>

The ACB believes that individuals with visual impairments are capable, but that more resources are needed to train everyone to become an "elite blind person."<sup>126</sup> The organization recognizes that visual impairments often require accommodation.<sup>127</sup> Given that the original impetus behind the Rehabilitation Act was to prevent continued indifference to the difficulties faced by individuals with disabilities,<sup>128</sup> the ACB hopes that raising awareness of their struggles may encourage some service providers to act on their own initiative and be proactive about ameliorating difficulties that individuals with disabilities may face.<sup>129</sup>

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<sup>122</sup> See generally Parloff, *supra* note 24.

<sup>123</sup> Editorial, *The American Council of the Blind Unwilling to Cooperate*, 44 BRAILLE MONITOR 8 (2001).

<sup>124</sup> American Council of the Blind Organizational Profile, <http://www.acb.org/profile.html> (last visited Apr. 20, 2008) [hereinafter ACB Profile].

<sup>125</sup> *Id.*

<sup>126</sup> Lupsa, *supra* note 105.

<sup>127</sup> *Id.* For a discussion of accommodation, see MARCUS, *supra* note 3, at 77 ("Walking with a sighted person is still the safest way for a blind person to get around, but then he is not independent. With guide dogs, long canes, and their senses, blind people have found the freedom of getting around by themselves.").

<sup>128</sup> See *supra* notes 36–39 and accompanying text.

<sup>129</sup> As noted above, one of the stated purposes of the organization is to minimize the problems associated with visual impairments and improve the capabilities of those individuals. ACB Profile, *supra* note 124.

Since 1983, the American Council of the Blind has been encouraging U.S. Treasury officials to make paper money easier to use for individuals with visual impairments.<sup>130</sup> It is the Council's position that individuals with visual impairments should not have to depend on the kindness of sighted individuals in order to engage in cash transactions.<sup>131</sup> According to the ACB, the current design of U.S. currency creates a needless impediment to handling money in a fast and easy manner for individuals with visual impairments.<sup>132</sup>

The ACB is also working on an initiative to pass legislation that would require adoption of "video description" technologies that give viewers with visual impairments the option of hearing voice-overs explaining the visuals on TV and movies.<sup>133</sup> The ACB's position on both currency redesign and "video description" technologies demonstrates their support for a variety of services that will facilitate access for individuals with visual impairments. The group believes that accepting such assistance leads to increased independence as opposed to reinforcing the perception that individuals with visual impairments are incapable.<sup>134</sup> Ideally, members of the ACB would like more remedial action to be taken without having to file lawsuits, but until that time they will continue to be proactive.<sup>135</sup>

### *C. Enablers versus Tough-Lovers?*

As the previous summary indicates, the National Federation of the Blind and the American Council of the Blind are philosophically divided on what constitutes discrimination against individuals with visual impairments and on what societal changes need to be made in order to give visually disabled

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<sup>130</sup> Parloff, *supra* note 24.

<sup>131</sup> Plaintiff's Memorandum in Opposition to Defendant's Renewed Motion to Dismiss or for Summary Judgment at 18, *Am. Council of the Blind v. Paulson*, 463 F. Supp. 2d 51 (D.D.C. 2006) (No. 1:02CV00864 JR).

<sup>132</sup> First Amended Complaint for Declaratory and Injunctive Relief at 1, *Am. Council of the Blind v. Paulson*, 463 F. Supp. 2d 51 (D.D.C. 2006) (No. 1:02CV00864 JR).

<sup>133</sup> Parloff, *supra* note 24. The NFB also opposes this position, stating in response to the lawsuit: "[o]ur focus is on education and working, not sitting at home and watching TV." *Id.* Furthermore, the NFB believes that while descriptive video is a good idea for entertainment, requiring an entertainment service by law is unnecessary. MONBECK, *supra* note 102. However, the ACB counters that, because emergency messages are often delivered via crawls along the bottom of the TV screen, video descriptions would address a legitimate safety concern. Parloff, *supra* note 24.

<sup>134</sup> MARCUS, *supra* note 3, at 77.

<sup>135</sup> Lupsa, *supra* note 105.

individuals “meaningful access” to programs and services in everyday life.<sup>136</sup> But the rift between the NFB and the ACB “cannot be reduced to enablers vs. tough-lovers.”<sup>137</sup> The NFB has shown a willingness to litigate when it deems access to something essential is being denied.<sup>138</sup> And the ACB does not seek to be an “enabler” for individuals with visual impairments, but rather hopes that by exposing the general public to difficulties experienced by individuals with disabilities in everyday life it can raise awareness and change attitudes.<sup>139</sup>

The different stances of the NFB and the ACB on the issue of currency redesign are due in part to dissimilar views about what constitutes equality. As mentioned above, one reason that the NFB is supporting the Treasury Department in its appeal of *American Council of the Blind v. Paulson* is that the organization fears that currency redesign resulting from this litigation will encourage the perception that those with disabilities are incapable.<sup>140</sup> To the NFB, saying that individuals with visual impairments lack meaningful access to currency is akin to saying that individuals with visual impairments cannot successfully handle their own money in its present form.<sup>141</sup> And perpetuating this view would actually be a step backwards for the NFB in its mission to have individuals with visual impairments viewed and treated as equals “with their sighted neighbors”<sup>142</sup> The NFB believes equality is achieved by adapting and using currency as it is.<sup>143</sup>

Conversely, the ACB believes that greater equality will come from not having to be dependent on others to identify currency during cash transactions.<sup>144</sup> Moreover, putting aside the potential (not probable) shift in general public and employer perceptions that could result from redesigning currency, the ACB emphasizes that the effect on individuals with visual impairments will be increased confidence and security when entering into cash transactions.<sup>145</sup> The ACB believes that equality results from removing

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<sup>136</sup> See *supra* Part III.A–B.

<sup>137</sup> Parloff, *supra* note 24.

<sup>138</sup> See *supra* notes 118–20 and accompanying text.

<sup>139</sup> See *supra* Part III.B.

<sup>140</sup> Press Release, National Federation of the Blind, National Federation of the Blind Applauds Treasury Appeal (Dec. 12, 2006), <http://www.nfb.org/nfb//NewsBot.asp?MODE=VIEW&ID=111&SnID=695924276>. See also *supra* notes 115–17 and accompanying text.

<sup>141</sup> Brief of Amicus Curiae National Federation of the Blind in Support of Appellant, *supra* note 108, at 12.

<sup>142</sup> *Id.* at 2.

<sup>143</sup> See *id.*

<sup>144</sup> See Brief for Appellee at 10, *Am. Council of the Blind v. Paulson*, 463 F. Supp. 2d 51 (D.D.C. 2006), *appeal docketed*, No. 07-5063 (D.C. Cir. Sept. 20, 2007).

<sup>145</sup> *Id.*

needless barriers so that individuals with visual impairments can use currency with the same ease and assurance as everyone else.<sup>146</sup>

In addition to having distinct definitions of equality, the two groups have different priorities. The NFB does not believe currency redesign should be a priority for individuals with visual impairments.<sup>147</sup> “Given the urgent need for access to [internet] information that is required for success in America’s information economy, the matter of identifying the denominations of paper bills is of relatively little concern.”<sup>148</sup> The NFB believes it is more appropriate to focus on litigating issues where individuals with disabilities are “entirely shut out from employment, goods, or services.”<sup>149</sup> Because identifying money by feel would only result in alleviating an inconvenience rather than ending discrimination,<sup>150</sup> such advancement should not be prioritized according to NFB philosophy.<sup>151</sup>

In prioritizing the Target litigation,<sup>152</sup> the NFB draws the distinction that access to online information is more directly linked to the ability of individuals with visual impairments to become productive members of society.<sup>153</sup> Internet use is commonplace in educational settings and in the workplace, so obtaining access can help individuals with visual impairments prepare for employment and ultimately earn an income.<sup>154</sup> However, a similar argument can be made for currency redesign: making currency distinguishable by touch may allow individuals with visual impairments access to a wider variety of jobs.<sup>155</sup> Furthermore, of the estimated 3 million visually impaired Americans,<sup>156</sup> approximately one-half use computers,<sup>157</sup>

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<sup>146</sup> See *id.*

<sup>147</sup> Brief of Amicus Curiae National Federation of the Blind in Support of Appellant, *supra* note 108, at 11.

<sup>148</sup> Parloff, *supra* note 24.

<sup>149</sup> Brief of Amicus Curiae National Federation of the Blind in Support of Appellant, *supra* note 108, at 13.

<sup>150</sup> Discrimination under the ADA encompasses the denial of the opportunity to participate in programs or services, and providing those with disabilities separate, but unequal, goods or services. 42 U.S.C. § 12182(b)(1)(A)(i)–(iii).

<sup>151</sup> Parloff, *supra* note 24.

<sup>152</sup> See *supra* notes 118–20 and accompanying text.

<sup>153</sup> Parloff, *supra* note 24.

<sup>154</sup> See *id.*

<sup>155</sup> OurMoneyToo.org, <http://www.ourmoneytoo.org/myths.php> (last visited Apr. 20, 2008); \$1, \$20? Only USA Makes Bills Hard for Blind to Use, USA TODAY, Dec. 14, 2006, at A17.

<sup>156</sup> Am. Council of the Blind v. Paulson, 463 F. Supp. 2d 51, 53 (D.D.C. 2006). Some estimates for the number of blind and visually impaired Americans range as high as 10 million. American Federation of the Blind website, Blindness Statistics, <http://www.afb.org/Section.asp?SectionID=15#num> (last visited Apr. 20, 2008).

but almost everyone uses money. Making websites more accessible arguably will not have the broad impact that currency redesign would.

#### IV. IMPLICATIONS OF THE DIFFERING PHILOSOPHIES OF THE NATIONAL FEDERATION OF THE BLIND AND THE AMERICAN COUNCIL OF THE BLIND

##### A. *The Big Picture*

Discord centered on whether certain actions will help or hinder the progress of individuals with disabilities is not uncommon. Many people with disabilities have been critical of celebrity fundraisers, such as telethons, that depict an image of children and adults with disabilities as helpless or pathetic,<sup>158</sup> and rarely can any single organization represent the range of needs of a diverse population. While it would be perverse for the courts to implement a remedy that, as the NFB suggests, would have unfavorable consequences for individuals with visual impairments, it is not clear that currency redesign will have that effect.

Other modifications that were initially designed to accommodate individuals with disabilities have not resulted in negative perceptions and have been beneficial to society as a whole.<sup>159</sup> For example, closed captioning on televisions was originally advocated as a means to provide deaf individuals with access to the audio portion of programs.<sup>160</sup> Now this tool is so frequently used by airports, hospitals, bars, and gyms that it is hardly associated with the hearing impaired.<sup>161</sup> Curb cuts were designed to accommodate wheelchairs, but benefit “people with strollers, wheeled luggage and moving dollies.”<sup>162</sup> Along these lines, redesigning paper currency has the potential to benefit a wide range of people<sup>163</sup> and, due to the

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<sup>157</sup> American Federation for the Blind website, Blindness Statistics, *supra* note 156 (stating that there are about 1.5 million visually impaired Americans who use computers).

<sup>158</sup> Harlan Hahn, *Accommodations and the ADA*, in BACKLASH AGAINST THE ADA 337 n.22 (Linda Hamilton Krieger ed., 2003).

<sup>159</sup> See Day Al-Mohamed, *Accessible Paper Currency—Myth vs. Fact*, reprinted in Melanie Brunson, *A Milestone for Money and Meaningful Access*, BRAILLE FORUM, Feb. 2007, available at <http://www.acb.org/magazine/2007/bf022007-2.html>.

<sup>160</sup> See *id.* See also Royal M. Hopper III, *Closed Captioning Creates Careers*, NWI.COM, Dec. 3, 2005, [http://www.thetimesonline.com/articles/2005/12/03/news/top\\_news/eb25b88614d68d40862570cc00075f85.txt](http://www.thetimesonline.com/articles/2005/12/03/news/top_news/eb25b88614d68d40862570cc00075f85.txt).

<sup>161</sup> Al-Mohamed, *supra* note 159.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* Currency redesign could “work to the benefit of seniors, individuals with cognitive disabilities and even people without disabilities in environments where there is low lighting such as restaurants, taxicabs, and bars.” *Id.*

fact that currency redesign is becoming more common in order to stay ahead of counterfeiters,<sup>164</sup> there is also the possibility that redesign will not be perceived primarily as an accommodation for individuals with visual impairments.

### B. *The Application of the Meaningful Access Standard*

At first blush, the conclusion that individuals with visual impairments are denied “meaningful access” to paper currency seems less convincing when the National Federation of the Blind, the largest advocacy group for visually disabled Americans, maintains that they do have “meaningful access.”<sup>165</sup> However, the NFB appears to equate “meaningful access” with access in general.<sup>166</sup> If the meaningful access standard is to have any vitality, Section 504 cannot be applied only to situations of “no access” as the NFB seems to suggest by arguing that it is more appropriate to focus on litigating issues where individuals with disabilities are “entirely shut out from employment, goods, or services.”<sup>167</sup>

A currency transaction is comprised of two distinct parts: “handing over currency to another individual, and receiving currency back as change.”<sup>168</sup> Without the ability to distinguish among various denominations on both sides of a transaction, individuals with visual impairments cannot meaningfully participate in a cash transaction.<sup>169</sup> “It can no longer be successfully argued that a blind person has ‘meaningful access’ to currency if she cannot accurately identify paper money without assistance.”<sup>170</sup> Therefore, as long as currency redesign does not constitute an undue burden, it is warranted.

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<sup>164</sup> See *infra* note 176 and accompanying text.

<sup>165</sup> See *supra* Part III.A.

<sup>166</sup> See *supra* Part III.A.

<sup>167</sup> Brief of Amicus Curiae National Federation of the Blind in Support of Appellant, *supra* note 108, at 13. There is some evidence that Section 504 is most effective in eliminating exclusionary practices and outright denials of benefits, the grossest methods of denying equal opportunity. Wegner, *supra* note 86, at 406. Section 504 is less effective in eliminating forms of discrimination where some level of participation is permitted, as is the case with currency. *Id.* However, the standard for determining whether discrimination in violation of the Rehabilitation Act exists is clearly the “meaningful access” standard, and this standard does not require that no access be established in order for there to be no meaningful access. See *supra* Part II.C.

<sup>168</sup> Brief for Appellee, *supra* note 144, at 9.

<sup>169</sup> *Id.* at 10.

<sup>170</sup> *Am. Council of the Blind v. Paulson*, 463 F. Supp. 2d 51, 59 (D.D.C. 2006).



### C. *The Application of the Undue Burden Standard*

#### 1. *A Brief Overview of U.S. Currency Design and Circulation*

The Department of the Treasury is an Executive branch agency that is charged with producing currency and coinage.<sup>171</sup> Specifically, the U.S. Mint produces coins and the Bureau of Engraving and Printing (BEP) produces currency notes.<sup>172</sup> The federal government first began general circulation of paper money in 1861.<sup>173</sup> Since that time, despite the expense, the appearance of U.S. currency has been changed several times.<sup>174</sup> The first significant redesign occurred in 1929, and this version remained essentially unchanged for the next 67 years.<sup>175</sup> Then in 1996, the BEP again noticeably altered the look of currency and announced that a redesign would be undertaken every 7–10 years to stay ahead of counterfeiters.<sup>176</sup> The most recent currency put into circulation is the Series 2004, which was introduced on October 9, 2003 with a new \$20 note.<sup>177</sup>

The 1996 redesign cost the BEP approximately \$34 million, of which \$26 million was used to fund a public education campaign.<sup>178</sup> This redesign also increased annual production costs by \$31 million.<sup>179</sup> The total initial cost for the 2004 redesign was approximately \$113 million.<sup>180</sup> This included approximately \$38 million for the purchase of six new presses and \$50

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<sup>171</sup> United States Department of the Treasury, Duties & Functions, <http://www.ustreas.gov/education/duties> (last visited Apr. 20, 2008).

<sup>172</sup> United States Department of the Treasury, Fact Sheets: Currency & Coins, <http://www.ustreas.gov/education/fact-sheets/currency/distribution.shtml> (last visited Apr. 20, 2008).

<sup>173</sup> United States Bureau of Engraving and Printing, History of U.S. Currency, <http://www.moneyfactory.gov/newmoney/main.cfm/currency/history> (last visited Apr. 20, 2008).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> United States Bureau of Engraving and Printing, New Money, <http://www.moneyfactory.gov/newmoney/print.cfm/currency/new20> (last visited Apr. 20, 2008).

<sup>178</sup> *Am. Council of the Blind v. Paulson*, 463 F. Supp. 2d 51, 57 (D.D.C. 2006). The total costs of the 1996 redesign also included \$1.5 million for research, consultation, and design, \$4.5 million for engraving and manufacturing new printing plates, \$1.1 million for inspection equipment, \$200,000 for in-house contracts, and \$90,000 for site preparation. *Id.* at 57 n.6.

<sup>179</sup> *Id.* at 57.

<sup>180</sup> *Id.*

million for a public education campaign.<sup>181</sup> The 2004 redesign also increased annual costs by over \$25 million.<sup>182</sup>

## 2. *The Burden Imposed by Currency Redesign*

There are multiple proposals for currency redesign: dimensions varied by denomination, embossed dots, foil, micro-perforations, and raised intaglio printing, to name a few.<sup>183</sup> Presumably, a reliable, government-subsidized, pocket-sized currency reader would also be an acceptable response by the Treasury Department.<sup>184</sup> However, individuals with visual impairments will not be entitled to any of these accommodations if they entail either “undue financial and administrative burdens” or a “fundamental alteration in the nature of a program.”<sup>185</sup>

The government’s main argument is that the cost of currency redesign would result in an undue burden precluded by Supreme Court precedent.<sup>186</sup> Most of the proposals would require increased spending in the following categories: “1) research, consultation and redesign; 2) plate engraving and manufacturing; 3) purchasing and installing new equipment; 4) production of the currency; 5) public education; and 6) replacing worn currency.”<sup>187</sup> The government also attached cost estimates to each of these categories. The most significant expense would be that of acquiring new equipment, which would cost between \$100 and \$130 million.<sup>188</sup> Producing currency of different dimensions would increase annual production costs by \$36 to \$45 million, and a public education campaign would cost between \$70 and \$90 million.<sup>189</sup> Finally, replacing worn currency would result in an annual cost of \$92 to \$109 million.<sup>190</sup> Therefore, it could cost up to \$320 million initially,

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<sup>181</sup> *Id.* The total cost of the 2004 redesign also included \$6.1 million for site preparation; \$13.1 million for research, consultation, and design; and \$5 million to manufacture new printing plates. *Id.* at 57 n.7.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 59.

<sup>184</sup> *Am. Council of the Blind v. Paulson*, 463 F. Supp. 2d 51, 56 (D.D.C. 2006).

<sup>185</sup> *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 410, 412 (1979). *See also supra* Part II.D.

<sup>186</sup> *Am. Council of the Blind*, 463 F. Supp. 2d at 62. They also argued that alterations would interfere with Bureau of Engraving and Printing’s ability to prevent counterfeiting, undermine international acceptance of U.S. currency, and decrease the lifespan of currency. *Id.* at 60–61. However, these arguments were less persuasive to the court than the government’s financial argument. *See id.*

<sup>187</sup> Brief for the Appellant, *supra* note 22, at 35.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

and up to \$174 million annually, to redesign currency.<sup>191</sup> Furthermore, the change would affect the vending machine industry and ATMs, and would potentially require redesign of cash registers and wallets.<sup>192</sup>

However, compared with \$420 million, which is the average amount that the Bureau of Engraving and Printing (BEP) has spent per year over the past ten years,<sup>193</sup> the costs required to undertake a redesign that would help 3 million Americans with visual impairments are not unreasonable. If over the same ten year period currency had been redesigned to include an embossed numeral, at an initial cost of \$45.5 million and an annual cost of \$16 million, this would have increased BEP spending from \$4.2 billion to approximately 4.4 billion, which is an increase of less than five percent per year.<sup>194</sup> Furthermore, if the government was to incorporate the “new feature into a larger redesign, such as those that took place in 1996 or 2004, the total burden of adding such a feature would be even smaller.”<sup>195</sup>

When currency is redesigned, the Treasury Department has historically continued to honor previous designs of U.S. currency—currency has never been recalled when a new design was introduced.<sup>196</sup> If this policy remained in place, it would, at least in part, undermine the utility of making certain structural changes to bills, such as making different denominations different sizes. Having old currency in continued circulation would prevent individuals with visual impairments from being able to make distinctions with certainty because there would still be a chance that the bill they received would be an old design. In order for a currency redesign to be effective, old notes would have to be taken out of circulation. This factor may improve the government’s undue burden argument. However, many countries successfully transitioned from one form of currency to another when the Euro was adopted by allowing dual currency for a two-month period in order for the transition to the Euro to be smooth and successful.<sup>197</sup>

Therefore, despite the costs and administrative planning required, it is not clear that currency redesign will result in an undue burden. There are multiple alternatives for currency redesign, and the court in *American*

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<sup>191</sup> *Id.*

<sup>192</sup> *Good Morning America: Bush Admin. Pushes Back; Money for the Blind?* (ABC television broadcast Dec. 14, 2006).

<sup>193</sup> *Am. Council of the Blind v. Paulson*, 463 F. Supp. 2d 51, 62 (D.D.C. 2006).

<sup>194</sup> *Id.* The embossed numeral is the least expensive redesign alternative.

<sup>195</sup> *Id.* See also *supra* Part IV.C.1.

<sup>196</sup> U.S. Dep’t of the Treasury, FAQs: Currency, <http://www.ustreas.gov/education/faq/currency/portraits.shtml> (last visited Apr. 20, 2008).

<sup>197</sup> Allister Bull, *Europe Bids Old Currencies a Last Goodbye—Euro Becomes Sole Legal Tender After an Orderly Transition*, TORONTO STAR, Mar. 1, 2002, at E2. The shift to the Euro had the additional complication of valuing different currencies, but the transition was still completed successfully.

*Council of the Blind v. Paulson*, after considering the evidence presented, did not believe that any of them would be unduly burdensome to implement.<sup>198</sup> Furthermore, the fact that other countries have been able to transition from one form of currency to another indicates that this is a feasible alternative that is not unduly burdensome.

## V. WHAT SHOULD BE DONE?

*American Council of the Blind v. Paulson* left open two options for injunctive relief: altering currency so that it is distinguishable by touch or providing individuals with visual impairments with government subsidized bill-scanning devices.<sup>199</sup> Under Section 504, either option would satisfy the “meaningful access” requirement.<sup>200</sup> However, “separate but equal” should not be the option chosen. Even though it may be more expensive to redesign currency, it would be a better alternative than portable electronic scanning devices, because when opportunities exist to provide equal rights through equal treatment, they should be utilized.

The Rehabilitation Act aims “to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society.”<sup>201</sup> Additionally, under the regulations implementing Section 504, it is stated that “[r]ecipients shall administer programs and activities in the most integrated setting appropriate to the needs of the qualified [individuals with disabilities].”<sup>202</sup> Arguably, the “most integrated setting” requirement could be read as discouraging separate but equal access where a more universal remedy could be imposed.<sup>203</sup> Redesigned currency would apply to all users equally.

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<sup>198</sup> 463 F. Supp. 2d 51, 62 (D.D.C. 2006).

<sup>199</sup> *Id.*

<sup>200</sup> See *supra* Part II.C for a discussion of meaningful access.

<sup>201</sup> 29 U.S.C. § 701(b)(1).

<sup>202</sup> 29 C.F.R. § 32.4(d) (2004).

<sup>203</sup> The ADA has a similar regulation, which provides: “[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.” 28 C.F.R. § 35.130 (2004). Some defendants have argued that different standards for “integrated setting” are required under Section 504 and the ADA. This argument is based on a footnote in *Olmstead v. L.C.*, 527 U.S. 581, 600 n.11 (1999), stating, “[u]nlike the ADA, § 504 of the Rehabilitation Act contains no express recognition that isolation or segregation of persons with disabilities is a form of discrimination. Section 504’s discrimination proscription, a single sentence attached to vocational rehabilitation legislation, has yielded divergent court interpretations.” However, this footnote was not directed at actual Rehabilitation Act claims, which has generally been recognized by courts in post *Olmstead* decisions. See, e.g., *Frederick L. v. Dep’t of Pub. Welfare*, 157 F. Supp. 2d 509, 535 (E.D. Pa. 2001).

The redesign selected must meet the following criteria: (1) easy to use and reliable; (2) long-wearing, maintaining readability over the life of the banknote; (3) benign, not significantly degrading banknote durability; (4) cost-effective for the BEP to implement; (5) difficult to simulate; and (6) relatively inexpensive for the population to use.<sup>204</sup> These criteria are all met by making banknote denominations different sizes; the length, height, or both dimensions of the note can be changed.<sup>205</sup> This is an established practice in over 120 countries in the world and it may be the best remedy because, in countries where currency is size-denominated, organizations representing individuals with visual impairments recommend continuation of this practice—the system is considered extremely useful once an individual is trained to use it.<sup>206</sup>

## VI. THE POTENTIAL IMPACT OF CURRENCY REDESIGN ON ACCOMMODATIONS FOR INDIVIDUALS WITH DISABILITIES

The tragedy is that for two hundred years [individuals with disabilities] have not been asked about their needs and desires. Buildings went up before their inaccessibility was “discovered”—and then it was too late. During America’s periods of greatest growth, when subways were constructed, television and motion pictures produced, telephone lines laid, school programs designed, and jobs manufactured, [individuals with disabilities] were hidden away in attics, “special” programs and institutions, unseen and unheard. Day by day, year by year, America became ever more oppressive to its hidden minority.<sup>207</sup>

Man-made obstacles force people into limited lives more than any specific physical or mental disability.<sup>208</sup> Major Supreme Court decisions about disability rights have ignored the many advantages provided to those without disabilities and the disadvantages imposed on people with disabilities

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<sup>204</sup> NAT’L RES. COUNCIL, CURRENCY FEATURES FOR VISUALLY IMPAIRED PEOPLE 13–26 (1995).

<sup>205</sup> *Id.* at 40. The American Council of the Blind agreed that one-dollar bills can remain unchanged. *Am. Council of the Blind v. Paulson*, 463 F. Supp. 2d 51, 59–60 (D.D.C. 2006). The vending machine industry is concerned about the cost of altering machines to accept a new currency design. At least some vending machines only take coins and dollar bills, so allowing the dollar to remain could save the vending machine industry some expense.

<sup>206</sup> *Id.* at 41.

<sup>207</sup> BURKE, *supra* note 35, at 70.

<sup>208</sup> *Id.* at 76.

by features of the environment that are either virtually invisible or taken for granted.<sup>209</sup>

Describing a condition as discrimination as opposed to an inconvenience invites moral condemnation and requires remedial action.<sup>210</sup> Section 504 transformed federal disability policy by making access for individuals with disabilities a civil right rather than a welfare benefit.<sup>211</sup> This paradigm shift provided a symbolic context for the problem of inaccessibility.<sup>212</sup> Between 1976 and 1980, disability advocates used symbols successfully.<sup>213</sup> For example, by linking accessibility with civil rights, costly alterations to buildings and transit systems were equated with providing equal opportunity.<sup>214</sup> Job accommodations and auxiliary aids were made available in the name of fairness.<sup>215</sup> By taking advantage of symbolic power and using it to evoke popular support, *American Council of the Blind v. Paulson* may lead to other thoughtful changes in the name of disability rights.

If individuals with visual impairments do not have "meaningful access" to paper currency, then it is likely that they do not have "meaningful access" to many other materials and services provided by the federal government.<sup>216</sup> For example, printed government materials, such as handbooks, manuals, and application forms not provided in Braille or some other accessible format would deprive individuals with visual impairments to the information contained therein.<sup>217</sup> Additionally, other materials of different denominations, such as food stamps, would also require redesign.<sup>218</sup>

Moreover, upholding the decision in *American Council of the Blind v. Paulson* could prompt lower courts to conclude that a duty to accommodate does exist under Section 504. In *Alexander v. Choate*, the Supreme Court held that Section 504 is not so broad as to reach all action disparately affecting individuals with disabilities.<sup>219</sup> The Court stated:

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<sup>209</sup> Hahn, *supra* note 158, at 27. Hahn's article discusses judicial decisions under the ADA allowing unintentional barriers to individuals with disabilities to remain.

<sup>210</sup> SCOTCH, *supra* note 28, at 156.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 161.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> Defendant's Renewed Motion to Dismiss or for Summary Judgment at 17, Am. Council of the Blind v. Paulson, 463 F. Supp. 2d 51 (D.D.C. 2006) (No. 1:02CV00864 JR) (explaining that the Rehabilitation Act was not intended to require such changes).

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 17-18.

<sup>219</sup> 469 U.S. 287, 298 (1985).

Because [individuals with disabilities] typically are not similarly situated to [those without disabilities], [interpreting Section 504 to reach all unequal treatment] would in essence require each recipient of federal funds first to evaluate the effect on [individuals with disabilities] of every proposed action that might touch the interests of [individuals with disabilities], and then to consider alternatives for achieving the same objectives with less severe disadvantage to [individuals with disabilities].<sup>220</sup>

In addition to applying the statute narrowly, the Supreme Court has consistently interpreted Section 504 in a pro-defendant manner.<sup>221</sup> Between 1979 and 1996, the Supreme Court heard seventeen Section 504 cases, and only two of them resulted in a pro-plaintiff holding.<sup>222</sup> If the decision in *American Council of the Blind v. Paulson* is upheld, it could cause a redefinition of what constitutes base-level access and could serve as an alert to federal service providers to retool, redesign, or renovate a service, program, or building.

## VII. CONCLUSION

Section 504 brought rights to the forefront of the disability movement.<sup>223</sup> However, neither the Department of the Treasury nor Congress took action under Section 504 to make alterations in the design of U.S. currency. A problem with administrative processes and agency-based enforcement is that political pressures and lobbyists may influence the agency's actions.<sup>224</sup> A lawsuit circumvents these outside pressures.<sup>225</sup>

Currently, the design of currency is discriminatory. *American Council of the Blind v. Paulson* brings into clearer focus just how the design of an item

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<sup>220</sup> *Id.*

<sup>221</sup> Ruth Colker, *The Death of Section 504*, in BACKLASH AGAINST THE ADA 323, 337 n.22 (Linda Hamilton Krieger ed., 2003).

<sup>222</sup> *Id.* Colker cites *Consolidated Rail Corporation v. Darrone*, 465 U.S. 624 (1984) and *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) as cases with pro-plaintiff holdings. *Id.* Colker also found that four of the seventeen cases could not be readily classified as pro-plaintiff or pro-defendant, but that eleven of the decisions during this time period were clearly pro-defendant. See Traynor v. Turnage, 485 U.S. 535 (1988); Lane v. Pena, 518 U.S. 187 (1996); Bowen v. Am. Hosp. Ass'n, 476 U.S. 610 (1986); U.S. Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597 (1986); Alexander v. Choate, 469 U.S. 287 (1985); Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985); Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883 (1984); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984); Cmty. Television of S. Cal. v. Gottfried, 459 U.S. 498 (1982); Se. Cmty. Coll. v. Davis, 442 U.S. 397 (1979).

<sup>223</sup> BURKE, *supra* note 35, at 67.

<sup>224</sup> *Id.* at 96.

<sup>225</sup> *Id.*

that is necessary to conduct many important personal daily transactions can inadvertently discriminate against individuals with disabilities. Redesigning currency not only could raise awareness, but it also could give more vitality to the Rehabilitation Act. And, as for the debate between the ACB and the NFB, claiming a right owed under the law is not an indication that individuals with visual impairments are helpless or incapable.<sup>226</sup>

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<sup>226</sup> See *id.* at 102 (explaining that by focusing on rights instead of needs, individuals with disabilities can access government resources without coming across as pitiable and helpless).